No. 97-501

(13)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RANDALL RICCI,
Petitioner,
v.
VILLAGE OF ARLINGTON HEIGHTS,
A MUNICIPAL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits warrantless arrests for misdemeanors that do not involve a breach of the peace.

2. Whether an arrest that is supported by probable cause is per se unreasonable under the Fourth Amendment solely because the underlying offense is punishable by a fine and not by incarceration.

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INTEREST OF THE *AMICI CURIAE* [1]

Amici are organizations whose members include state, county and municipal governments and officials through-

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no

out the United States. *Amici* have a compelling interest in the legal issue presented in this case: whether the Fourth Amendment prohibits warrantless arrests for offenses committed in the presence of the arresting officers.

There are many recurring situations in which state and local government law enforcement officers must, if the law is to be enforced, have the authority to make warrantless arrests for offenses committed in their presence, even if the penalty for the offense is a fine. At the state level, the effective enforcement of a wide range of essential motor vhicle laws would be undermined by the adoption of petitioner's position. At the municipal level, the meaningful exercise of the police power—which "extends to all the great public needs," *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1910) (Holmes, J.)—would be seriously compromised. Because municipal governments bear the primary responsibility for enacting and enforcing laws to protect the great public needs of our cities, towns, and counties, they must have the corresponding ability to enforce these laws. Consequently, adoption by this Court of the position of petitioner and his *amici* "would constitute an intolerable handicap for legitimate law enforcement." *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975).

Because of the importance of the questions presented to *amici* and their members, *amici* respectfully submit this brief to assist the Court in resolving this case.

STATEMENT

Amici adopt respondent's statement.

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counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici* or their members, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. Contrary to petitioner's contention, the Fourth Amendment does not incorporate the ancient common law rule prohibiting warrantless arrests for misdemeanors that do not involve a breach of the peace. This Court's Fourth Amendment cases "have not 'simply frozen into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage.'" *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981) (citation omitted). Instead, in making its determinations as to what law enforcement practices are reasonable, the Court looks to the laws of the States and of the federal government.

Over the past century, virtually every State has enlarged the authority of law enforcement officers to allow warrantless arrests for misdemeanors not involving a breach of the peace. *See* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 776-86 & nn. 10-22 (1993). Congress likewise has enacted numerous laws giving federal law enforcement personnel the same authority. *See, e.g.*, 18 U.S.C. § 3052 (FBI). *See also* American Law Institute, Model Code of Pre-Arraignment Procedure § 120.1 (1975). Under this Court's cases, this body of law demonstrates that warrantless arrests for misdemeanors not involving a breach of the peace are reasonable under the Fourth Amendment.

II. A. The Fourth Amendment does not prohibit warrantless arrests for "fine only" offenses committed in the arresting officer's presence. The Fourth Amendment's core mechanism for circumscribing the arrest authority of law enforcement officers is the requirement of probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975); *Whren v. United States*, 116 S.Ct. 1769, 1776 (1996). When, as in this case, a citizen not only commits an offense in the presence of a police officer, but admits that he is in the course of committing the offense, *see* Pet.

App. 7a, the strongest possible case of probable cause is presented and no Fourth Amendment violation occurs as the result of an arrest.

B. 1. The ability of law enforcement officers to arrest for ordinance violations committed in their presence is essential to legitimate law enforcement. City and county ordinances, such as those violated by petitioner, are enacted and enforced pursuant to the police powers of local government in order to protect the public. These laws are no less essential to the public good simply because violations are punishable by fines rather than by a period of incarceration. Not only may such fines be substantial as they were in this case, *see* Pet. App. 7a, such offenses are often just as destructive of the fabric of urban life as those that are punishable by imprisonment.

2. Because arrests are costly and time-consuming for law enforcement personnel as well as for the arrestee, police officers and administrators will ordinarily prefer to issue a citation on the spot rather than to arrest the offender. There are, however, simply too many recurring situations in which a citation—even for a "fine only" offense—will not suffice to protect the public interest, or at times even the interest of the arrestee. For this reason the statutes and case law of numerous States authorize warrantless arrests for "fine only" ordinance violations committed in the arresting officer's presence. So do a number of federal statutes.

There are many circumstances in which the public interest necessitates warrantless arrests of persons committing "fine only" offenses in a law enforcement officer's presence. These include: where the arrest is necessary to ensure the cessation of the unlawful conduct, such as when the offender is mobile or transient; the refusal of the offender to sign a notice to appear at the hearing on the charges; the inability or refusal of the offender to produce identification to the arresting officer, or the pro-

duction by the offender of questionable identification; and where the offender poses a danger to himself or to others.

It is not possible to devise a constitutional prohibition on warrantless arrests for "fine only" offenses that would not "constitute an intolerable handicap for legitimate law enforcement." *Gerstein*, 420 U.S. at 113. Rather, this Court should leave this matter to be addressed by the States pursuant to their respective laws, as they have done.

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT PROHIBIT WARRANTLESS ARRESTS FOR MISDEMEANORS THAT DO NOT INVOLVE A BREACH OF THE PEACE

The Fourth Amendment does not prohibit warrantless arrests for misdemeanors that do not involve a breach of the peace. The ancient common law rule to the contrary has been enlarged by statute in virtually every State and by Congress. Moreover, this Court's Fourth Amendment cases are grounded in the recognition that "decisions in this area have not 'simply frozen into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage.'" *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981) (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980)). As Justice Marshall wrote for the Court in *Steagald*,

> The common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.

451 U.S. at 217 n.10. The Fourth Amendment thus "must be interpreted 'in light of contemporary norms and conditions.'" *Id.* (quoting *Payton*, 445 U.S. at 591 n.33). *See also Tennessee v. Garner*, 471 U.S. 1, 13 (1985).

The core inquiry in every Fourth Amendment case is "reasonableness." *Whren v. United States*, 116 S.Ct. 1769, 1776 (1996); *Payton*, 445 U.S. at 585-86. In its case law analyzing the constitutionality of arrests, the Court has discerned contemporary norms and conditions, and thus made a determination of what law enforcement practices are reasonable, by studying the practices of the States and the determinations of Congress. *See United States v. Watson*, 423 U.S. 411, 418-24 (1976).

A review of state and federal law demonstrates that there is "virtual unanimity on this question" among the States, *Payton*, 445 U.S. at 600, which have enlarged the common law rule to permit warrantless arrests for misdemeanors that do not involve a breach of the peace. Further, Congress has enacted numerous statutes that authorize federal law enforcement officers to "make arrests without warrant for any offense against the United States committed in their presence," 18 U.S.C. § 3052, a grant of authority far broader than the common law. There is accordingly no basis for petitioner's suggestion that the Fourth Amendment incorporates the antiquated common law rule that limited warrantless arrests to misdemeanors involving a breach of the peace.

A. As this Court has repeatedly recognized, the common law power of arrest can be enlarged by statute. *See, e.g., Bad Elk v. United States*, 177 U.S. 529 (1900). Professor Schroeder recently undertook an exhaustive analysis of state law on warrantless arrests and concluded that the "breach of the peace requirement . . . has been abandoned in almost every American jurisdiction." William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 848 (1993).

With the "growth of organized police forces in the late nineteenth and early twentieth centuries, most American jurisdictions attempted to expand the common law arrest powers." *Id.* at 789. By the early 1920's, another commentator writes, "[s]tatutes and municipal charters . . . quite generally authorized an officer to arrest for any misdemeanor whether a breach of the peace or not, without a warrant, if committed in the officer's presence." Horace L. Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 673, 705-06 (1924).

In the mid-1960's, yet another survey of the law of arrest concluded that "most modern statutes have enlarged the powers of arrest without warrant to extend to any offense committed in the presence of the arresting officer, including those not amounting to a breach of the peace." Edward C. Fisher, *Laws of Arrest* 181 (1967). This study further explained that while "'[a]t common law the right to arrest for a misdemeanor committed in the presence of the officer is confined to those offenses which amount to a breach of the peace . . . the distinction is of slight importance today.'" *Id.* (quoting 4 Am. Jur. *Arrest* § 26). Hence, it is no surprise that today not only has the breach of the peace requirement been abandoned by statute in virtually every American jurisdiction, but that "[r]ecently, the trend away from the common law rule has accelerated." Schroeder, 58 Mo. L. Rev. at 785.[2]

B. The determination of Congress, another important part of the Fourth Amendment calculus, *see Watson*, 423 U.S. at 423, has likewise been to expand the powers of federal law enforcement personnel to arrest for non-felony offenses not involving a breach of the peace. Numerous federal statutes grant federal officials the authority to "make arrests without warrant for any offense against the United States committed in their presence." 18 U.S.C.

[2] The statutory authority for these conclusions is collected in Schroeder, 58 Mo. L. Rev. at 777-86 nn. 10-22.

§ 3052 (FBI); *see also id.* § 3050(3) (Federal Bureau of Prisons); *id.* § 3053 (U.S. Marshals Service); *id.* § 3056 (c)(1)(C) (Secret Service); *id.* § 3061(a)(2) (U.S. Postal Service); *id.* § 3063 (Environmental Protection Agency); 16 U.S.C. § 1a-6(b)(1) (National Park Service); 26 U.S.C. § 7608(a)(3) (Internal Revenue Service); 40 U.S.C. § 212a (U.S. Capitol Police); 42 U.S.C. § 2456a (National Aeronautics and Space Administration); *id.* § 7270a (Strategic Petroleum Reserve). These statutes are "the expression of the judgment of Congress that such an arrest is 'reasonable.'" *Payton*, 445 U.S. at 590.

This statutory expansion of arrest authority is fully supported by the American Law Institute, Model Code of Pre-Arraignment Procedure (1975).[3] The section of the Model Code that governs arrest without a warrant does not require a breach of the peace for a warrantless arrest for a misdemeanor or petty misdemeanor, but rather requires only that such an offense be committed "in the officer's presence." ALI Model Code § 120.1(1)(c) (*quoted in Watson*, 423 U.S. at 422 n.11).[4] "'The Code thus adopts the traditional and almost universal standard for arrest without a warrant.'" *Watson*, 423 U.S. at 422 (quoting Commentary to Model Code § 120.1, at 289 (footnotes omitted)).

Notwithstanding the foregoing, petitioner asserts that the law and practice in "the overwhelming majority of states" are "contemporary translations of the common law rule." Pet. Br. 13-14. Petitioner is in error. The law

[3] On the history and importance of the ALI Model Code, *see Watson*, 423 U.S. at 422.

[4] The Model Code further expands the common law rule by authorizing arrests for misdemeanors not committed in the arresting officer's presence "if the officer has reasonable cause to believe that such person . . . (i) will not be apprehended unless immediately arrested; or (ii) may cause injury to himself or others or damage to property unless immediately arrested." Model Code § 120.1 (*quoted in Watson*, 423 U.S. at 422 n.11).

of virtually every State, federal law, and the ALI Model Code all conclusively establish that any common law rule requiring a breach of the peace for a warrantless misdemeanor arrest has long since been abandoned throughout the country. Under this Court's cases, this uniform body of law demonstrates that warrantless arrests for misdemeanors not involving a breach of the peace are reasonable and thus not proscribed by the Fourth Amendment.

II. THE FOURTH AMENDMENT DOES NOT PROHIBIT WARRANTLESS ARRESTS FOR "FINE ONLY" OFFENSES COMMITTED IN THE ARRESTING OFFICER'S PRESENCE

A. Commission of an Offense in the Arresting Officer's Presence Is the Strongest Possible Case of Probable Cause

Petitioner and his *amici* rightly decry the prospect that the police be given "vast and unchecked power." ACLU Br. *Am. Cur.* 16. In this regard the ACLU observes that "[i]t is by now familiar history that the framers' dismay at statutes granting general prerogatives to search and seize (like the writs of assistance) was one of the principal motivating factors, not only for the Revolution, but for the creation of the Fourth Amendment itself." *Id.* at 16 (citing Nelson B. Lasson, *The History and Development of the Fourth Amendment* 13-78 (1937)).

More to the point, however, "[t]here is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *Watson*, 423 U.S. at 429 (Powell, J., concurring) (citing Lasson, *History of the Fourth Amendment*, at 79-105). Indeed, "the Second Congress' passage of an Act authorizing such arrests so soon after

the adoption of the Fourth Amendment itself underscores the probability that the constitutional provision was intended to restrict entirely different practices." *Id.* at 429-30. *See also id.* at 420-21 (majority opinion).

The Fourth Amendment responds to the problem of unbounded police discretion to arrest by its requirement of probable cause. To allow an arrest on some lesser basis than probable cause would " 'leave law-abiding citizens at the mercy of the officers' whim or caprice,' " *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)), the precise evil posed by the infamous writs of assistance. *See also Whren*, 116 S. Ct. at 1776 ("*probable cause*" is the "*traditional justification*" for "police intrusion"). Thus, *Gerstein* elaborates,

> The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

420 U.S. at 111-12 (citations omitted). Under this standard, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.* at 113-14. *Cf. Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (under "plain-view" doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant") (citations omitted).

It is obvious that when, as in this case, a citizen not only commits an offense in the presence of an officer but admits to the officer that he is in the course of committing the offense, *see* Pet. App. 7a, there is not the remotest possibility that a " 'law-abiding citizen[]' " will be left " 'at the mercy of the officers' whim or caprice.' " *Gerstein*, 420 U.S. at 112 (citations omitted). On the contrary, the admission by a citizen to a police officer that he is in the course of committing an offense presents the strongest possible case of probable cause. And while "in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors . . . [w]ith rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren*, 116 S. Ct. at 1776.

In *Whren* the Court elaborated on the "rare exceptions" that require such balancing.

> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body.

Id. at 1776-77 (citations omitted).

This case does not remotely resemble any of these "rare exceptions." [5] Indeed, the facts of this case have much in

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[5] Although *Payton* and *Welsh v. Wisconsin*, 466 U.S. 740 (1984), involved warrantless entries into a home, those entries were non-consensual. *See Payton*, 445 U.S. at 576, 587; *Welsh*, 466 U.S. at 743 n.1 (assuming entry to be non-consensual). In this case, by contrast, not only was the arrest made at petitioner's place of business rather than his home, the entry was justified by the arrest

common with those of *Whren* itself, in which officers had observed the plaintiff committing a "civil traffic violation." *Id.* at 1771. Despite the ubiquity of such violations, the *Whren* Court emphasized that it was "aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." *Id.* at 1777.

Petitioner's commission of, and admission to, an offense in the presence of the arresting officers obviate the need for any further Fourth Amendment analysis in this case. *See Whren*, 116 S. Ct. at 1776. Even if the Court concludes that further balancing is necessary, however, the Fourth Amendment does not prohibit warrantless arrests for "fine only" ordinance violations committed in the presence of a law enforcement officer. Such a holding "would constitute an intolerable handicap for legitimate law enforcement." *See Gerstein*, 420 U.S. at 113; *see also Watson*, 423 U.S. at 431 (Powell, J., concurring).

B. The Ability to Arrest for Ordinance Violations Committed in the Presence of Arresting Officers Is Essential to Legitimate Law Enforcement

In some Fourth Amendment cases the Court concludes that it is necessary to engage in a detailed "balancing of

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warrant the officers were serving on one of petitioner's employees, who listed petitioner's office as his place of business. *See* Resp. Br. 1-2.

Given the text of the Fourth Amendment, this Court has always treated cases involving non-consensual searches or arrests within the home as unique. *See Payton*, 445 U.S. at 585 ("the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed' ") (citation omitted); *see also id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)) (Fourth Amendment is directed at "invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life").

all relevant factors" in order to determine whether the Fourth Amendment standard of "reasonableness" has been met. *Whren*, 116 S. Ct. at 1776. Balancing the harm to the arrestee against the needs of effective law enforcement demonstrates that warrantless arrests for offenses committed in the presence of the arresting officer are not prohibited by the Fourth Amendment.

1. *Local Government Ordinances, Including Those Punishable by Fines, Are Enacted And Enforced to Protect the Public*

The Arlington Heights ordinances which made it unlawful for petitioner to operate his telephone solicitation business without a license, Pet. App. 2a & n.1 (citing Village of Arlington Heights Code of Ordinances §§ 9-201, 14-3002), are a classic exercise of the police power. As Justice Holmes explained,

> the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911). "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs." *Berman v. Parker*, 348 U.S. 26, 32 (1954).[6]

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[6] As Professor Wilgus noted as early as 1924,

> It is impossible to classify or enumerate the great number of . . . misdemeanors or breaches of ordinances for which peace officers may arrest, without a warrant, if committed in their presence. They include violations of health and food regulations, Sunday travelling, or entertainments, nuisances on streets or sidewalks, or loitering, or meetings on same, cruelty

Nor are these concerns any less compelling merely because a violation of an ordinance may be punishable, at least in the first instance, by a monetary fine. Indeed, as attested to by this case, such fines can be considerable. *See* Pet. App. 7a ("By the time he was arrested, Ricci was facing a potential fine of tens of thousands of dollars."). And such offenses are no less destructive of the fabric of urban life merely because they involve what may at times be imprecisely referred to as "lesser" offenses.[7]

"[O]ne of the most important activities of local government is the regulation of trades and businesses." Osborne M. Reynolds, Jr., *Local Government Law* 503 (1982). The compelling purposes of such regulation "include protecting the public from fraudulent activity or price-gouging" and the protection of public health and safety through the licensing and regulation of food vendors. *Id.* at 504-09. Local governments also regulate trades and professions, particularly those involving public health and welfare (*e.g.*, barbering, cosmetology), and

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to animals, vagrancy, drunkenness, disturbances in school houses, or at elections. . . .

Wilgus, 22 Mich. L. Rev. at 706-07 (citations omitted).

Of course, with the passage of time and the increasing complexity of urban life, the specific ordinances on which the quality of life depends have in some instances changed. *See* Resp. Br. 35, 37 (citing numerous provisions of the Chicago Municipal Code setting forth "fine only" offenses).

[7] In Washington, D.C., for example,

> The city's rows of decapitated [parking] meters are not unlike the subway graffiti sociologist Nathan Glazer described 20 years ago in an essay for *The Public Interest*. Glazer wrote that graffiti imbues the passerby with "the inescapable knowledge that the environment he must endure for an hour or more a day is uncontrolled and uncontrollable, and that anyone can invade it to do whatever damage and mischief the mind suggests."

Stephanie Mencimer, "When Meters Expire," *Washington City Paper*, July 4, 1997, at 19.

safety (*e.g.*, contractors, electricians, plumbers). 3 C. Dallas Sands, *et al.*, *Local Government Law* § 15.08 (1996). They also license and regulate taxis, busses, and other vehicles for hire, *id.* § 15.12, and merchandising, including auctions, auctioneers, retailers, peddlers, hucksters, other transient merchants, and used car and other secondhand dealers. *Id.* § 15.16. "[D]oor-to-door salespersons, solicitors, canvassers, etc." also engage in activities whose control "is often thought necessary to the health and well-being of the community." Reynolds, *Local Government Law* at 511. *See Breard v. City of Alexandria*, 341 U.S. 622 (151).[8]

Today, door-to-door sales has been replaced by telemarketing, with all of its potential for harassment, fraud and exploitation of the trusting, unsophisticated, or elderly.[9] In this case, for example, as petitioner acknowledges, the Arlington Heights Police Department had, prior to his arrest, "received complaints about the business practices of petitioner's firm," Pet. 2, including complaints "about 'high pressure to contribute . . . on behalf of the

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[8] In *Breard*, the Court emphasized the important public purposes served by an ordinance regulating door-to-door sales:

> Door-to-door canvassing has flourished increasingly in recent years. . . . Unwanted knocks on the door by day or night are a nuisance, or worse, to peace and quiet. . . .
>
> [R]esponsible municipal officers have sought a way to curb the annoyances.

341 U.S. at 626-27.

[9] *See, e.g.*, *AARP Plots New Measures to Foil Telemarketing Fraud*, Orange County (Cal.) Register, Feb. 19, 1998, at A17; *Telemarketing Fraud Rings US Huge Losses*, Rocky Mountain News, Nov. 21, 1997, at 5B (noting study of Department of Justice estimating annual losses to citizens of U.S. and Canada from telemarketing fraud at $40 billion per year; "the swindlers frequently prey on the elderly and . . . fraud accounts for as much as 10 percent of the industry").

Arlington Heights Police Department'" when he was in fact soliciting money for an officers' association. *Id.* (quoting Pet. App. 20a). The essential first step in effectively regulating the business practices of "telemarketers" is to require them to obtain a license, like any other business.[10]

2. *Law Enforcement Officers Must Have the Ability to Make Warrantless Arrests for "Fine Only" Offenses Committed in Their Presence*

Any arrest of an offender is a serious intrusion on the arrestee, and should not be undertaken lightly. Indeed, arrests are costly and time-consuming for law enforcement personnel as well as for the arrestee. *See* ALI Model Code § 120.2 note at 16. Police officers and administrators will ordinarily prefer to issue a citation on the spot rather than to arrest the offender, if circumstances clearly indicate that a citation will suffice both to enforce the law and to assure the arrestee's appearance at subsequent judicial proceedings on the charges. *See* ALI Model Code § 120.2(4) (encouraging "the maximum use of citations, so that persons believed to have committed offenses will be taken into custody only when necessary in the public interest").[11]

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[10] "Regulatory authority extends to the requirement that persons and activities subject to regulation . . . keep detailed records of their operations reasonably related to the effectuation of legitimate police power objectives." Sands, *Local Government Law* § 14.37. The purpose of this and other license-related requirements is "protection of the consumer from abuses that might occur as a result of incompetent or unethical practices." *Id.* § 15.02.

[11] Although petitioner characterizes his arrest as a "full custodial arrest," Pet. 3, it was less intrusive than most arrests. Petitioner was not handcuffed and did not undergo an inventory search or fingerprinting. At the station he was not placed in a cell but rather in an interview room where members of the public, such as witnesses and crime victims, wait to speak to investigators. He was

There are, however, simply too many recurring situations—arising in the context of "fine only" offenses just as in other contexts—in which a citation will not suffice to protect the public interest, or at times even the interest of the arrestee. For this reason, a prohibition of such arrests would be "an intolerable handicap for legitimate law enforcement," *Gerstein*, 420 U.S. at 113, and would undermine the balancing of interests at the heart of the Fourth Amendment's reasonableness inquiry.

The necessity for the ability to make such arrests is amply demonstrated by the existence of numerous state laws that authorize warrantless arrests for ordinance violations committed in the arresting officer's presence. Of particular relevance to this case, "under Illinois law a police officer is authorized to arrest those found violating municipal ordinances that provide for only a fine and no incarceration time." *Mustfov v. Rice*, 663 F. Supp. 1255, 1269 (N.D. Ill. 1987) (citing Ill. Rev. Stat., ch. 110A, para. 528; *People v. Edge*, 94 N.E.2d 359, 363 (Ill. 1950); Chicago Municipal Code § 11-25). *See also, e.g.*, Cal. Penal Code § 836(a)(1) (warrantless arrest authorized when arresting officer "has reasonable cause to believe that the person . . . has committed a public offense in the officer's presence"); *id.* § 15.3 (defining "public offense" as a violation of law punishable by fine); *id.* § 853.6 (enumerating situations in which officer should arrest offender, rather than issuing a citation);[12] Fla.

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at the station for approximately one hour and did not believe he was under arrest until shortly before his release. *See* Resp. Br. 9-10. Petitioner's arrest was thus less intrusive than what this Court sanctioned in *Gerstein* when it upheld "a brief period of detention [necessary] to take the administrative steps incident to" an arrest based on probable cause. 420 U.S. at 114.

[12] Although Cal. Penal Code § 853.6 encourages the issuance of citations for persons arrested for "an offense declared to be a misdemeanor, including a violation of any city or county ordinance,"

Stat. Ann. § 901.15(1) (warrantless arrest authorized when arrestee has "violated a municipal or county ordinance in the presence of the officer"); Mich. Comp. Laws § 764.15(a) (authorizing warrantless arrest by peace officer for "ordinance violation committed in the peace officer's presence"); Minn. Stat. Ann. § 629.34 subd.1(c) (authorizing warrantless arrest "when a public offense has been committed or attempted in the officer's or constable's presence"); *State v. Sellers*, 350 N.W.2d 460, 462 (Minn. Ct. App. 1984) (defining "public offense" to include violation of municipal ordinances " 'punishable by fine *or* imprisonment' ") (citation omitted); Mo. Rev.

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that section goes on to enumerate the numerous situations in which the offender should not be cited and released. These include:

> (1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.
>
> (2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.
>
> (3) The person was arrested under one or more of the circumstances listed in [Vehicle Code] Sections 40302 [failure to provide "satisfactory evidence of . . . identity" or "give a written promise to appear"] and 40303 [unsafe operation of vehicle or riding bicycle under the influence]. . . .
>
> (5) The person could not provide satisfactory evidence of personal identification.
>
> (6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.
>
> (7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.
>
> (8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.
>
> (9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

Cal. Penal Code § 853.6.

Stat. § 544.216 (authorizing warrantless arrests by state, county or municipal law enforcement officer of "any person the officer sees violating or who such officer has reasonable grounds to believe has violated any law of this state, including a misdemeanor or infraction, or has violated any ordinance over which such officer has jurisdiction"); N.H. Rev. Stat. Ann. § 594:10.I(a) (authorizing warrantless arrest of person whom peace officer "has probable cause to believe . . . has committed a misdemeanor or violation in his presence"); N.Y. Crim. Proc. Law § 140.10(a) (authorizing warrantless arrest of a person for "[any] offense when [the officer] has reasonable cause to believe that such person has committed such offense in his presence"); N.Y. Penal Law § 10.00.1 (defining an "offense" as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state"); Ohio Rev. Code Ann. § 2935.03 (authorizing warrantless arrest by state or local law enforcement officer of "a person found violating . . . a law of this state, an ordinance of a municipal corporation, or a resolution of a township"); Tex. Crim. Proc. Code Ann. § 14.01(b) ("A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."); *Howard v. State*, 932 S.W.2d 216, 217 (Tex. App. 1996) (ordinance violation is an "offense" under Texas statute authorizing warrantless arrests).[13]

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[13] According to the ACLU (Br. *Am. Cur.* at 15 & n.17), "eight states' statutory schemes appear to . . . categorically prohibit[] custodial arrests for fine-only offenses." Qualification of this statement is in order for at least three of those eight States.

In Pennsylvania, for example, Pa. Stat. Ann. tit. 53, § 13349 and Pa. R. Crim. P. tit. 42, Rule 6002(a) confer upon the Philadelphia police the authority to arrest for ordinance violations committed in their presence. *See In re William M.*, 655 A.2d 158 (Pa. Super. Ct.) (upholding warrantless arrest of juvenile for curfew violation), *appeal denied*, 666 A.2d 1058 (Pa. 1995). *See also Com-*

The pressing needs of law enforcement have led to the adoption of the foregoing laws and others like them, including at the federal level.[14] These laws demonstrate why

monwealth v. Williams, 568 A.2d 1281, 1284 (Pa. Super. Ct. 1990) (borough police have authority to make warrantless arrests for violation of "'any ordinances of said borough for the violation of which a fine or penalty is imposed'") (quoting Pa. Stat. Ann. tit. 53, § 46121).

Alaska Stat. §§ 12.25.035 and 12.25.180 authorize warrantless arrests for ordinance violations and infractions, the latter when the person "does not furnish satisfactory evidence of identity; or . . . refuses to accept the citation or to give a written promise to appear." *Id.* § 12.25.180(b)(2).

Under Alabama law, "[p]olice officers may arrest any person without a warrant, on any day and at any time, for the violation of a City ordinance committed in their presence." *Hood v. City of Bessemer*, 404 So.2d 710, 715 (Ala. Crim. App. 1980) (collecting cases), *aff'd*, 404 So.2d 717 (Ala. 1981). *See also* Ala. R. Crim. P. 4.1(a)(1)(ii) (authorizing warrantless arrest for "[a]ny offense" committed in "the officer's presence or view"); Ala. Code § 13A-1-2(1) (defining "offense" as "[c]onduct for which a sentence to a term of imprisonment . . . or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state"); *Moon v. State*, 262 So.2d 615 (Ala. Crim. App. 1972); Birmingham (Ala.) City Code § 9-2-25 (authorizing all Birmingham police officers to "arrest without warrant any person who, in their presence, commits any violation of this code or other city ordinance or any other law").

Insofar as the ACLU's characterization of the remaining five States—Delaware, Kentucky, Maine, Rhode Island, and South Dakota—is correct, their laws simply illustrate the fundamental point made by the Fourth Circuit many years ago:

> The fourth amendment protects individuals from unfounded arrests by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974).

[14] Federal statutes grant federal law enforcement personnel authority to make warrantless arrests for violations of federal law punishable only by monetary penalties. For example, Chapter 16

a ruling by this Court that the Fourth Amendment prohibits warrantless arrests for "fine only" ordinance violations would unduly interfere with legitimate law enforcement. *Amici* respectfully submit that if municipal governments are to bear the chief responsibility for enacting and enforcing laws to protect the "great public needs" of our cities, towns, and counties, *see Noble State Bank*, 219 U.S. at 111, they must have the concomitant ability to enforce these laws. As already noted, there are strong fiscal and logistical disincentives against warrantless arrests; nonetheless, there are many recurring situations in which the public interest necessitates warrantless arrests of persons committing offenses in the presence of the arresting officer.[15]

First are situations in which an arrest is necessary to ensure the cessation of an ongoing violation. *See* Cal. Penal Code § 853.6(7) (authorizing warrantless arrest where there is "reasonable likelihood that the offense or offenses would continue or resume"). Besides petitioner's case, *see* Pet. App. 7a, there are a wide range of other situations—particularly those involving mobile or transient offenders—where meaningful enforcement of important municipal laws may require the arrest of the offender. For example, a person unlawfully blaring mes-

of Title 16 of the U.S. Code authorizes an official of the Coast Guard, Department of Commerce, or Customs Service to arrest, "with or without a warrant or other process, . . . any persons . . . committing in his presence or view a violation of this chapter or the regulations issued thereunder," 16 U.S.C. § 959(d), notwithstanding that such violations are punishable only by fines. *Id.* § 957. Title 16A, which implements the Atlantic Tuna Conventions, authorizes warrantless arrests even though violations of its provisions are punishable only by civil penalties. *See* 16 U.S.C. §§ 971e & 971f.

[15] For these reasons, a ruling that the Fourth Amendment prohibits warrantless arrests for "fine only" offenses might well lead state and local legislatures to add periods of incarceration to the possible penalties for violations of these laws.

sages or music from a sound truck can, if simply cited and released, readily move to another part of a large urban area and resume the violation. This is also true of persons vending food from a cart without a license, selling prohibited materials such as fireworks or phony watches from a cart or an improvised stand, or conducting games of chance on a sidewalk. It may likewise be necessary in order to enforce the law with respect to persons who operate unlicensed cabs, delivery trucks, tow trucks, or vans for hire. *See Mustfov*, 663 F. Supp. at 1258-59.

Another category of cases arises when the offender is cited but "refuses to sign a promise to appear." ALI Model Code § 120.1 commentary at 305. The offender "should then be arrested and taken to the police station for further proceedings." *Id.* This situation includes, but is not limited to, those instances in which the offender is a motorist from out of state. *See, e.g.*, Cal. Veh. Code § 40302 (offender to be arrested if he "refuses to give [the officer] his written promise to appear in court"). *See also* Cal. Penal Code § 853.6(9).[16]

Another important—and growing—category of cases are those in which the offender has no identification to furnish to the officer, furnishes identification which the officer has reason to believe is not genuine, or flatly refuses to furnish any identification. *See, e.g.*, Cal. Penal Code § 853.6(5). In these cases the mere issuance of a citation is meaningless, inviting repeated violations and contempt for the law.

[16] For example, the City of Milwaukee, near the Chicago metropolitan area, has recently had great success fostering urban revitalization by sponsoring a variety of street fairs. At the same time, the City Code makes it an offense, punishable only by a fine, to possess a small amount of marijuana for personal use. *See* Milwaukee Code of Ordinances § 106-38. Clearly the City would be hard pressed to enforce this ordinance against persons from out of state unless the Milwaukee police could invoke the power of arrest.

Nor will such incidents arise only when a violator simply lacks identification; organized groups wishing to publicize their cause may engage in unlicensed parades or demonstrations, purposely blocking city streets or other areas in the hope of being cited. They may well wish to carry things one step further and heighten media attention by refusing to provide identification to law enforcement officers, thereby leaving the police no choice but to arrest them if respect for the law is to be maintained.

Yet another category involves offenses in which the violator poses a danger either to himself or to others, as, for example, if he is intoxicated or under the influence of drugs. *See* Cal. Penal Code § 853.6(1); Cal. Vehicle Code § 40303 (authorizing warrantless arrest for "riding a bicycle while under the influence of an alcoholic beverage or any drug"). An arrest is also necessary when the offender abusively resists issuance of a citation. *See* ALI Model Code § 120.2 commentary at 304 (arrest necessary for otherwise citable offense where officer cannot rely on the "voluntary cooperation" of the offender).

The common law (on which petitioner and his *amici* so heavily rely) has evolved similarly. Contemporary English law authorizes warrantless arrests for petty misdemeanors or other minor offenses for reasons that mirror many of those in American law. These include: (1) that the name of the "relevant person[17] is unknown to, and cannot be readily ascertained by, the constable"; (2) that the constable has "reasonable grounds for doubting whether a

[17] English law defines the "relevant person" as "any person whom the constable has reasonable grounds to suspect of having committed or having attempted to commit the offense or of being in the course of committing or attempting to commit it." *Halsbury's Laws of England* (4th ed. 1990) para. 707 n.2 (citing Police and Criminal Evidence Act 1984 sec. 25(2)). English common law is thus more permissive than the law of many American jurisdictions in that it does not have an "in presence" requirement for a warrantless arrest.

name furnished by the relevant person as his name is his real name"; (3) that (a) the relevant person has "failed to furnish a satisfactory address for service; or (b) the constable has reasonable grounds for doubting whether an address furnished by the relevant person is a satisfactory address for service"; (4) that the constable has "reasonable grounds for believing that arrest is necessary to prevent the relevant person (a) causing physical injury to himself or any other person; (b) suffering physical injury; (c) causing loss of or damage to property; (d) committing an offence against public decency; or (e) causing an unlawful obstruction of the highway"; or (5) that the constable has "reasonable grounds for believing that arrest is necessary to protect a child or other vulnerable person from the relevant person." *Halsbury's Laws of England*, para. 707 (footnotes omitted).

The ALI Model Code of Pre-Arraignment Procedure—which seeks to balance individual rights and the needs of law enforcement, *see id.* at xiii-xiv—expressly declines to adopt a rule prohibiting warrantless arrests for "petty misdemeanors" committed in the presence of the arresting officer. While stating a preference for the "maximum" use of citations, *see id.* § 120.2(4), the drafters of the Code nonetheless recognized that in many situations it will be "necessary in the public interest" that persons who commit offenses be arrested and taken into custody rather than cited on the spot and released. *Id.* The drafters thus concluded that "[i]t is extremely difficult in drafting a statute to make determinations that citations shall always be used for particular crimes." *Id.* commentary at 305.[18]

[18] The drafters of the Model Code give the following examples of circumstances in which a warrantless arrest may be "necessary in the public interest":

> A person may be arrested for a minor offense under circumstances which suggest that identification procedures might identify him as a person wanted for a more serious offense. Persons who habitually ignore summonses and citations in traffic cases are often discovered when arrested on a minor offense and fingerprinted. In other cases the most effective way of avoiding a potentially explosive situation on the street as the result of an arrest for a minor offense may be to transport the arrested person quickly, to a police station. In still other cases the arrested person may be intoxicated, or wounded, or otherwise unfit to be left on the street with a citation in his hand.

Id. commentary at 305-06.

It is no solution to suggest, as does the ACLU, that warrantless arrests are permissible only when there are "exigent circumstances." ACLU Br. 22-23. This concession, helpful insofar as it acknowledges that the Fourth Amendment does not prohibit warrantless arrests for fine only offenses, is patently insufficient to meet the needs of law enforcement. *See, e.g., Payton*, 445 U.S. at 583 ("exigent circumstances" are limited to "emergency or dangerous situation[s]"). Another of petitioner's *amici* highlights the insufficiency of the ACLU's proposed standard by urging that warrantless arrests be permitted in cases "involving a breach of the peace or a threat to public health or safety." National Association of Criminal Defense Lawyers Br. *Am. Cur.* 16.

The inability of petitioner's own *amici* to agree demonstrates the impossibility of devising a workable constitutional standard that would not "intolerabl[y] handicap . . . legitimate law enforcement." *Gerstein*, 420 U.S. at 113. It also demonstrates the wisdom of leaving this matter to be addressed by the States pursuant to their respective laws which, as indicated above, they have done.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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